IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10639 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

FEDERATION OF BUILDING ASSO

Versus

STATE OF GUJARAT

Appearance: Mr Nirupam D. Nanavaty, Senior Counsel with Mr Harin P. Raval & Mr. Prem P. Chanshani, Advocates for NANAVATY ADVOCATES for the Petitioners

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CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE D.A.MEHTA
Date of Order: 12/10/2000

ORAL ORDER

(Per : MR.JUSTICE R.K.ABICHANDANI)

The petitioners seek to prosecute this petition in a representative capacity for framing of a Scheme, a draft of which is placed at Annexure "R" to this petition, for the purpose of granting relief and rehabilitation to the occupiers of the illegal and unauthorised constructions made on C.G Road, Off C.G Road and surrounding areas, with such alterations, additions and modifications as may be ordered by this Court.

2. The petitioner No.1 is a recently formed Federation, which is admittedly not a registered Association and the petitioners Nos. 2 to 9 are said to be it's office bearers, who are also the occupiers of the commercial complexes on the C.G Road. Amongst the other prayers sought in the petition are for, appointment of an enquiry commission as regards the unauthorised constructions and for fixing the responsibilities of the Municipal officers and ascertaining the role played by the builders and such officers, taking action against such officers and builders, creating fund by issuing directions to deposit for the purpose of carrying out the scheme, taking disciplinary action against architects, engineers concerned concerned with the unauthorised illegal constructions including prosecuting them under the law and restraining the respondent Corporation from taking any coercive measures and/or demolishing the illegal or unauthorised constructions on C.G Road and Off C.G Road and the surrounding areas. Alongwith the petition annexed at Annexure "A" is the list of the existing buildings on C.G Road of which 35 are shown under Part-I and 38 under Part-II. The list of 7 buildings under construction is at Annexure "B" to the petition. Then there is a list at Annexure "G" to the petition giving particulars of buildings situated at C.G Road, of which the occupiers are the members of the petitioner Federation. In this list 73 building complexes are enumerated.

2.1 In paragraph 12 of the petition, it is stated that one Consumer Protection Council and others had filed Special Civil Application No. 6794 of 1992, inter-alia, pointing out the illegalities in the construction and use of these complexes and praying for a relief that the Ahmedabad Municipal Corporation, the Town Planning Officer and the State of Gujarat be directed to take action against all builders, organisers, promoters, societies, companies, associations having any building or premises on C.G Road in particular and in any other place in Ahmedabad in general, to see that they use the premises in accordance with building use permission granted to them and in accordance with the building

bye-laws, TP Scheme and the regulations regarding development plan and in particular regulations with regard to zoning (CG Road being residential) and if necessary to pull down the unauthorised constructions. A copy of that petition has been annexed at Annexure "M" to the present petition. It will be seen from the prayer clause 11(A)(1) thereof that a relief was also sought against the occupiers of such buildings. Admittedly the occupiers were not made party respondents in that petition. The said Special Civil Application No. 6794 of 1992 alongwith Special Civil Application No. 6893/92, which was filed by the Ahmedabad Premises Users' Association and others were heard together and a Division Bench of this Court (Coram: Hon'ble Mr.Justice B.C.Patel and Hon'ble Mr.Justice P.B. Majmudar), by a detailed judgement dated 4th October, 2000, allowed the Special Civil Application No. 6794/92 in terms of the directions given and rejected the other petition. The Court also directed the Registry to notify the matter on 13th October, 2000 for compliance with the directions issued therein. The Hon'ble Mr.Justice P.B.Majmudar while fully concurring with the views expressed by Hon'ble Mr.Justice B.C.Patel, added His Lordship's views in so far as change of user from residence to commerce use was concerned and observed that by virtue of the resolutions which have been set aside because of the inaction on the part of the Ahmedabad Municipal Corporation, an irreversible position has been created and some innocent occupiers have been duped. It was observed that however, since some occupants have already filed Suits and obtained stay, it can be said that they were aware of the situation. It was further observed that it was not possible to ignore the fact that because of the so-called resolutions and the permissions granted, various commercial complexes have been constructed on C.G Road in the city and in the last many years those innocent occupiers are doing their business. Hon'ble Mr.Justice P.B.Majmudar in this background directed that while implementing the directions given by Hon'ble Mr.Justice B.C. Patel, the Corporation should consider the hardship of the occupants of the premises in view of the 1994 resolutions and may grant sufficient time to such occupiers to restore the premises to the use to which the plans were sanctioned. However, so far as the place reserved for parking is concerned, the Corporation must follow the directions as given by Hon'ble Mr.Justice B.C. Patel. It was further observed that so far as the rest of the directions regarding parking space etc. are concerned, His Lordship fully agreed with the views expressed by Hon'ble Mr.Justice B.C. Patel. With the above observations made, His Lordship expressed full agreement with the

views expressed by Hon'ble Mr.Justice B.C. Patel.

3. The directions which were issued in the judgement rendered by Hon'ble Mr.Justice B.C. Patel are contained in various paragraphs of the judgement and those which have bearing on the present petition are summarised hereunder:-

(i) The Corporation was directed to take action forthwith so far as the unauthorised construction is concerned, and should report to the Court about the action taken on or before 3.11.2000. The view taken on 6.9.2000 in A.O No. 441 of 1998 that no building should be permitted to be erected or continued to be occupied in contravention of the provisions of the Bombay Provincial Municipal Corporation Act, Building Regulations and the Bye-laws was reiterated.

(ii) The resolutions, dated 12.10.1992 passed by the Town Planning Committee and dated 17.11.1994 passed by the Administrator were quashed and set aside with a direction to the Municipal Corporation to strictly adhere to the "use zones" and permit erection of buildings and use and occupation of the new as well as the old buildings strictly in accordance with the Rules, Regulations and Bye-laws as are applicable to the "use zones";

(iii) Holding that the action of the Municipal Corporation permitting change of user was contrary to the provisions of law and that the Corporation had no authority to permit the change of user and the use zones and that the Corporation had erred in implementing the resolutions without the sanction of law and further that it had no authority of law either to levy conversion or licence fee or value added fee and thereby to permit unauthorised construction or illegal use and occupation of the place meant for parking and or residence or the like, it directed the Corporation to take action in such cases in accordance with law forthwith and report to the Court about the action taken;

(iv) The Corporation was directed to issue notice in accordance with law, if not issued, and require all such persons who are occupying and running shops, offices etc. in the places sanctioned in

the plans for parking and common amenities, irrespective of the fact whether any conversion/licence fee or value added fees has been paid for such buildings or not, and to ensure that the facilities as per the approved plans and as per the law are made available to the users, and, to give them sufficient time as contemplated in the Act, Rules and Bye-laws and on the expiry of the period of notice if the premises are not vacated, to seal such premises and cause the premises to be used for the purpose for which sanction was given in the approved plan and strictly in accordance with the use zone and Building Regulations, without waiting for any further orders from the Court;

(v) The Corporation was directed to forthwith ensure that the places sanctioned for parking and common amenities were made open and used for such purpose only. Holding that the occupiers who were using premises for purposes other than the permissible use in a residential zone on payment of conversion fees as per 1994 resolutions were also not entitled to use the premises for such purpose, a direction was given to the Corporation to issue notice to every occupier and give them reasonable time to vacate the premises and to put the premises to the permissible use as per the sanctioned plan;

(vi) The Corporation was to report to the Court about the actions taken against the professionals who were concerned with the unauthorised construction of buildings in this city and to inform the Institute of Architects if it is found that any architect has abated, aided or assisted in erection of a building contrary to the permission granted under the Act, Rules, Regulations and Bye-laws.

(vii) The Corporation was directed to ensure that all buildings are in conformity with the Building Regulations and to take immediate action to restore parking facilities in every building as per the Regulations;

(viii) Action was directed to be taken in accordance with law for change of use without being influenced by the fact that conversion fee was charged;

(ix) The Corporation was directed to disconnect sewage connection, if it is found that any person had illegally taken such connection, and not to provide water and sewage connection without "building use permission" being granted;

(x) The Ahmedabad Electricity Company was directed not to provide electric connection without production of "building use permission" issued by the Corporation; and

(xi) A Three Member Committee headed by a retired High Court Judge, a well-known Architect and a Structural Engineer was ordered to be constituted for fixing the responsibility of negligent officers stage-wise.

4. The learned Counsel appearing for the petitioners submitted that the nature of the present petition is entirely different from the nature of the petition which has been adjudicated upon by the Division Bench, though the buildings involved are on the same C.G Road and Off C.G Road. He submitted that in the present petition the petitioners have sought framing of a Scheme which was not the subject matter of the earlier petition. According to him, there is no overlapping in these two petitions. The scheme which is proposed in the present petition has relevance to the massive effect of the decision rendered which adversely has affected the interest of all the occupiers of such unauthorised constructions. It was submitted that the Corporation had made attempt to regularise the use and constructions, but in view of the Division Bench having set aside its resolutions, that could not be done and therefore these occupiers are left with no option but to approach this High Court with the suggested Scheme for rehabilitating them and granting relief to them. It was submitted that this was required to be done on the doctrine of necessity, which he submitted, should be invoked since nearly three lakhs of persons were getting affected as they were concerned with the trades and businesses which were run by these occupiers. He submitted that before the Division Bench, the legality and the validity of the resolutions made for regularising the use and unauthorised constructions was in issue and not the Scheme. It was also argued that the decision of the Division Bench was not binding on the present petitioners because the occupiers were not made parties to those petitions. He submitted that the occupiers though vitally concerned, were not heard and therefore the decision was rendered without following the principles of natural justice. He however, made it clear

that the petitioners are not challenging that decision or arguing against any of the directions which are given by the High Court in that decision. He submitted that the present petition was not hit by the principles of constructive res-judicata because the occupiers were not parties to the earlier petition and because the points involved in the earlier petition as well as the reliefs sought were different and there was no occasion therein to consider the question of rehabilitation of the occupiers. He also submitted that the State Government had power to make variation in the Schemes and plans and therefore, the question of conversion of zones from residential to commercial could be considered and decided even after the said decision and the purpose of suggesting the Scheme was to see that necessary changes are made.

4.1 The learned Counsel in support of his contention that the Court should entertain the present petition on the doctrine of necessity, relied upon the decision of Court of Appeal in Mitchell and others V. Director of Public Prosecutions and another, reported in (1987) Law Reports of the Commonwealth p. 127 and cited the observations at page 131 of the report, in support of his submission that the doctrine of necessity in public law is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law, but required in prevailing circumstances, by supreme public interest, for the salvation of the State and its people, as held by Josephides, J. quoted on page 133 of the report.

4.2. We have been taken through the record and the decision rendered by the Division Bench of this Court in Special Civil Application No. 6794 of 1992 and Special Civil Application No. 6893 of 1992 and have heard the learned Counsel who has argued at great length.

5. This petition filed by an unregistered Association of users of buildings situate on the C.G Road and Off C.G Road and its office bearers who are also the occupiers of the commercial complexes on C.G Road as stated by them though ostensibly claiming differently couched prayers, such as, seeking an order framing of a Scheme proposed for granting relief and rehabilitation to the occupiers of illegal and unauthorised constructions on the C.G Road and Off C.G Road, appointment of a high power commission to look into illegalities, seeking action to be taken against builders and developers of commercial complexes on C.G Road and Off C.G. Road as well as the Municipal Officers, is nothing but a crude

attempt to raise before a co-ordinate bench the selfsame issues which have been concluded very recently by a Division Bench of this Court in its judgement and order dated 4.10.2000, by which Special Civil Application No. 6794 of 1992 filed by the Consumer Protection Council was allowed and Special Civil Application No. 6893 of 1992 filed by the Ahmedabad Premises Users' Association and others against the local authority and the State was rejected. This was done after an elaborate consideration of the matter and the resolution dated 12.10.1992 of the Town Planning Committee as well as the resolution dated 17.11.1994 passed by the Administrator were set aside and the Ahmedabad Municipal Corporation was directed to strictly adhere to the use zone and to ensure that all buildings are in conformity with the present building Regulations and take immediate action to restore parking facilities in every building as per the Regulations and issued various other directions set out hereinabove, including a direction to notify the matter before it on 13.10.2000 for compliance with its directions issued in the judgement. That petition, also a PIL, related to unauthorised use of buildings situate on and Off C.G Road, conversion of the parking area into shops and inaction and/or connivance of the Municipal authorities. A direction was sought against the authorities to forthwith take action against all builders, occupiers, associations, promoters etc. having any building or premises on the C.G Road, Off C.G Road etc. to restrain them from making any illegal use of such premises and if necessary to evict the owners/occupants from the premises and pull down the constructions and to desist from regularising illegal construction or the illegal use of such buildings. In the present petition, the reliefs camouflaged in the Scheme proposed in prayer clause 32(B) are sought for the affected "occupiers" who, as defined in paragraph 3(i) of the Scheme, are the holders of premises on both sides of C.G Road in the commercial complexes commencing from Stadium Circle to Mahalaxmi Cross Roads, the details of which were supposed to be in Schedule I which is not annexed. In paragraph 7 of the scheme a seemingly innocuous provision is made, which if accepted will directly conflict with the decision of this Court in the above two petitions. It contemplates that on the coming into force of the proposed Scheme, the Ahmedabad Municipal Corporation shall stop all demolition process in respect of the premises covered under the Scheme, subject to the provisions contained in the Scheme. The word "premises" used in this paragraph is defined in definitions clause 3 (ii) of the Scheme to mean "the premises constructed in the building complexes contrary to the provisions of the original plan,

sanctioned by the Municipality and which are illegally converted from (i) hollow plinth, (ii) parking area, (iii) use of marginal land, (iv) change of user and (v) premises without fire safety measurements in cases of high-rise buildings." The "Fund" meant to be established under the Scheme (Clause 3 [iv]) is for the purpose of relief and rehabilitation of occupiers and/or "regularisation of the premises of the occupiers constructed contrary to the provisions of the Bombay Provincial Municipal Corporation Act, Rules, Regulation, Bye-laws, concerned Town Planning Scheme and Development Regulations. The reliefs contemplated under paragraphs 10 and 11 of the Scheme are that the Corporation will, after examining the feasibility, permit in any such building complexes construction of basement parking in the area available in the complex for which "the Municipal Corporation shall amend suitably the bye-laws, rules and regulation etc. to provide for such underground basement/parking places", and that "the Government shall consider and decide the change of user in respect of the resolution of the Ahmedabad Municipal Corporation which were pending before the Government from the year 1984 and the resolution of the year 1994 and take appropriate measures", (two resolutions including the resolution dated 17.11.1994 passed by the Administrator of the Corporation have been set aside by this Court in the said decision dated 4.10.2000 in Special Civil Application No. 6794 of 1992). In paragraphs 15 and 17 of this Scheme, protection is sought for the illegal constructions made upto 31st October, 2000. It therefore becomes at once clear that the scheme is designed to nullify the effect of the Division Bench judgement which in substance deals with the same controversy raised in those PIL proceedings. The present petition is also of PIL nature seeking to be representative of the affected parties who were the occupiers of the same buildings. The consideration of the questions raised and reliefs claimed in this petition will amount to examining the very controversy which has already been adjudicated upon in the PIL proceedings, the decision in which was, interalia, meant to affect the interests of occupiers and therefore operated quasi-in-rem, binding on all those whose interests were meant to be covered by it even when they were not actually before the Court. The petitioners whose interests in the buildings are affected by that decision cannot question it before this co-ordinate Court in this indirect manner and the whole attempt smacks of trying to over-reach the earlier verdict. This co-ordinate Court will have no jurisdiction to entertain the questions which are concluded by the Division Bench in respect of

these buildings on and around the C.G Road, which were the subject matter of those petitions, even on the ground that the petitioners were not heard though vitally interested in the matter and adversely affected by its outcome. The Court deciding those matters was fully aware that there were occupiers who would be affected adversely by the decision and this aspect reflects from the concurring judgement of Hon'ble Mr.Justice P.B. Majmudar.

Therefore, even the contention that the occupiers who had a vital interest in the proceedings were not heard, will not justify our adjudicating upon the questions in respect of the buildings on C.G Road and Off C.G Road under the guise of examining the proposed Scheme. There cannot be any dispute about the proposition that persons who are vitally interested in the proceedings are required to be heard, but it will not be open for this Court to go into the question as to whether the petitioners who are occupiers of the building complexes to which the said decision relates, were required to be heard by the Court before it adjudicated upon the disputes raised in the petition, because that is not the function of a co-ordinate Court. There is also no question of referring this matter to a larger Bench because that will not in any way affect the operation of the Division Bench judgement as regards the points concluded by it, which will bind the respective parties including the Corporation and consequentially the occupiers. It is obvious that what cannot be done directly, cannot be done indirectly and in our opinion, this petition cannot be entertained since we have no jurisdiction to decide upon the selfsame issues which have been concluded by the Division Bench. Both on legality and propriety this petition cannot be entertained and is rejected in limini.

6. We make it clear that we have not examined the merits or demerits of the controversy and we dispose of this petition on the ground that since most of the points which are tried to be raised in the present petition by the Scheme proposed are already covered by the decision of the Division Bench. It will be open for the petitioners to take recourse to such remedies as may be available to them under the law.

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